Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DR. RICHARD KAUFMAN, on behalf of himself and all others similarly situated, *et al.*,

Petitioners,

v.

ALLIED PILOTS ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should the Railway Labor Act be extended to preempt state law claims for damages suffered while a temporary restraining order is in effect, the union intentionally violates the order by striking, and the claimants are not parties to the collective bargaining agreement?

PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners, in addition to Richard Kaufman, Dr., on behalf of himself and all others similarly situated, are: Jack Marut, on behalf of himself and all others similarly situated; C. Anthony Wainsright, on behalf of himself and all others similarly situated; Jeffrey Krasnoff, Dr., on behalf of himself and all others similarly situated; Steven Carli, on behalf of himself and all others similarly situated; Shon Prejean, on behalf of himself and all others similarly situated; Center for Rehabilitative Medicine; Jim Cashion, individually and on behalf of the plaintiff class; Joellen Cashion, individually and on behalf of the plaintiff class; Mark Lewis, on behalf of himself and all others similarly situated; Nancy Geidel; Ralph A. MacDonald; Mary C. Cascino; Dave Rogers; and Carolyn Rogers.

Respondents

The Respondents, in addition to the Allied Pilots Association, are: Richard T. LaVoy; Brian A. Mayhew; David Aldrich; Stanley Bissell; Ernest Dryer; J. S. Ditty; David Duquemin; Mark Hunnibel; Jeff Marchand; Steve Roach; Randy Trommer; L. G. Foster; Robert Ames; Norman A. Patterson; and Dennis M. Breslin.

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The Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court sustained Petitioners' post-TRO state law claim for tortious interference with contractual relations during the period the temporary restraining order was in effect. It dismissed Petitioners' federal claims and remaining state law claims with prejudice. Declining to exercise supplemental jurisdiction, it also dismissed the post-TRO claim for tortious interference with contractual relations without prejudice. *In re Allied Pilots Class Action Litig.*, No. CIV.A.3:99-CV-0480P, 2000 WL 1405235 (N.D. Tex. Sept. 26, 2000). Appendix at 15a-37a. Respondents appealed. The United States Court of Appeals for the Fifth Circuit reversed the District Court, dismissing the Petitioners' TRO tortious interference claims with prejudice. *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001). Appendix at 1a-14a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 21, 2001. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Railway Labor Act, 45 U.S.C.A. §§ 151a and 184 (West 1986), are reprinted in the Appendix at 46a to 47a. The relevant provisions of the National Labor Relations Act, 29 U.S.C.A. §§ 157 and 158 (West 1998), are reprinted in the Appendix at 38a to 45a.

STATEMENT OF THE CASE

American Airlines ("American") acquired Reno Air but decided not to apply the collective bargaining agreement it had with its pilots to its new pilots from Reno Air. In protest, the Allied Pilots Association ("APA"), the collective bargaining agent for American's pilots, led its members to perform an illegal "sick-out" by falsely claiming they were too sick to go to work. American canceled thousands of scheduled flights nationwide. Because the sick-out violated the Railway Labor Act ("RLA"), 45 U.S.C.A. § 151, *et seq.*, (West 1986), the federal court entered a temporary restraining order directing the pilots to return to work and ordering the APA to stop encouraging the sick out. The APA intentionally violated the restraining order by continuing to encourage the sick out. During the restraining order period, the strike caused American to cancel thousands of flights and disrupted travel for tens of thousands of passengers.

Several passengers filed suit in various jurisdictions. These suits, consolidated in the United States District Court for the Northern District of Texas, comprise the action in this case. Plaintiffs filed a consolidated amended class action complaint seeking recovery under state and federal law against the APA and its officers for both pre-TRO and post-TRO conduct. The APA moved to dismiss, arguing that

Plaintiffs' federal and state claims were preempted by the RLA and should be dismissed with prejudice. The District Court disagreed. The court concluded that Plaintiffs' state law claim for tortious interference with contractual relations during the restraining order was not preempted by the Railway Labor Act or the Airline Deregulation Act, declined to exercise supplemental jurisdiction, and dismissed that claim without prejudice. *In re Allied Pilots Class Action Litig.*, No. CIV.A.3:99-CV-0480P, 2000 WL 1405235 (N.D. Tex. Sept. 26, 2000).

The APA appealed. The Fifth Circuit reversed the decision of the district court, dismissing Plaintiffs' state law claim. *Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197 (5th Cir. 2001). The Fifth Circuit reasoned that this Court's decisions in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), and *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986) preempted the state law claim.

The Fifth Circuit articulated a rule of universal preemption under *Garmon*, focusing on the "nature of the activities," *Allied Pilots*, 274 F.3d at 200. However, preemption has been denied in a number of labor related disputes. *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993); *Davies v. American Airlines, Inc.*, 971 F.2d 463, 466-467 (10th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993); *Gay v. Carlson*, 60 F.3d 83, 88 (2d Cir. 1995); *Shafii v. British Airways, PLC*, 83 F.3d 566, 570 (2d Cir. 1996); *Hirras v. Nat'l R.R. Passenger Corp.*, 44 F.3d 278, 285 (5th Cir. 1995); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317-318 (7th Cir. 1994); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 275 (8th Cir. 1994); *Maher v.*

New Jersey Transit Rail Operations, Inc., 593 A.2d 750, 758 (N.J. 1991); *Harris v. Hirsh*, 654 N.E.2d 975, 978-979 (N.Y. 1995) (per curiam). The Fifth Circuit cited *Gould* for the proposition that the scope of *Garmon* preemption was broad and that claims made by entities not a party to a labor agreement may be preempted. *Allied Pilots*, 274 F.3d at 201-202. The court deemed activity before or after entry of the restraining order to be the same for preemption analysis because the conduct at issue was work stoppage. *Id.* at 204. The court further held that the state interests did not outweigh the federal interests. *Id.* at 203.

Finding preemption under *Garmon*, the Fifth Circuit did not reach the issue of preemption under the ADA. *Id.* at 204. We do not address that issue in this petition.

Many cases at all levels hold that the federal government has an interest in a national labor policy. That policy finds protection in preemption under the various labor statutes, i.e., *Garmon*, (NLRA); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) (LMRA); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) (RLA). These statutes are not the same, do not define the same doctrines of preemption, and do not define the same protected or preempted conduct.

The RLA was created to regulate the railroad, and later, the airline industries. It established mandatory arbitration for "minor" disputes. *Hawaiian Airlines*, 512 U.S. at 252-253 (quoting *Consolidated Rail Corp. (Conrail) v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989)). "Minor" disputes "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" 45 U.S.C.A. § 151a (West 1986), and

relate to "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 252-253 (quoting *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33 (1957)). Minor disputes must be submitted to an "adjustment board," created by the carrier and the union.

The leading case for preemption under the NLRA is *Garmon, supra*. In *Garmon*, this Court broadly defined claims subject to preemption under the NLRA; but excluded from preemption claims in which:

> . . . the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-244 (citations omitted).

This Court recently defined RLA preemption in *Hawaiian Airlines*:

> A state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of [a collective bargaining agreement].

Hawaiian Airlines, 512 U.S. at 260.

The court in *Hawaiian Airlines* reasoned that the employee's wrongful discharge claim involved "'purely factual questions' about . . . [the] employer's conduct and motives and [did] not 'requir[e] a court to interpret any term of a collective-bargaining agreement.'" *Hawaiian Airlines*, 512 U.S. at 261-262 (quoting *Lingle*, 486 U.S. at 407). Because the rights at issue stood independent of the collective bargaining agreement, the employee's claim for wrongful termination was not preempted. *Hawaiian Airlines*, 512 U.S. at 266.

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari should be granted. The decision of the Fifth Circuit is against the weight of authority of this Court, it involves circumstances that have not been considered by any court prior to this, and it involves an important question of policy.

The authorities provided by this Court for the definition of preemption under the RLA require a search for a connection between the dispute and a collective bargaining agreement created under the RLA. No relationship exists between Petitioner-passengers' tortious interference claims and the collective bargaining agreement between the APA and American.

Even if the national labor policy defined by the RLA required much broader protection under the doctrine of preemption, the claims at issue here should not be preempted. The strike, which violated a validly issued temporary restraining order, was well beyond the outer boundaries of any national labor policy defined by the RLA. As they are exemplified by the RLA, those policies ended when the Court

entered the temporary restraining order. If any national policy of any "interest so deeply rooted in local feeling and responsibility" (*Garmon*) is involved in this case, it is a national judicial policy, i.e., a temporary restraining order validly entered by a valid court may not be flouted by a disappointed litigant who chooses to exercise his judgment in some manner other than the Court's determination. When the court entered the restraining order, the coverage of the Railway Labor Act ceased and the concepts of the state and federal judicial systems became dominant.

The Court should also review the decision of the Fifth Circuit because it presents a question of significant national importance that involves not one but two bodies of law. First, it involves the protection of a uniform national labor policy, the definition of the boundaries of preemption, and the protection of the state law rights of the public. Second, it involves an important consideration of the power of both the state and federal judiciaries to stop or require specifically identified conduct. Neither the national labor policy nor a national judicial policy exemplified by both the federal and state courts would be served by arbitrary decisions to ignore judicial orders. A civil claim for damages by members of the public deprived of dependable transportation (the most important of the many reasons for passing the RLA) would foster a national judicial policy and would not interfere with a national labor policy. At the same time the deterrent effect would be beneficial.

Last, the claim presented in this case, i.e., civil liability to third persons for a strike violating a valid restraining order, has never been adjudicated by any court, state or federal. This conduct can be expected in the future, especially if the unions have no deterrent from liability for civil damages.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 21, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-11223

RICHARD KAUFMAN, ETC.; ET AL.

Plaintiffs

RICHARD KAUFMAN, DR., on behalf of himself and all others similarly situated; JACK MARUT, on behalf of himself and all others similarly situated; C. ANTHONY WAINSRIGHT, on behalf of himself and all others similarly situated; JEFFREY KRASNOFF, DR., on behalf of himself and all others similarly situated

Plaintiffs-Appellees

versus

ALLIED PILOTS ASSOCIATION; ET AL.

Defendants

ALLIED PILOTS ASSOCIATION; RICHARD T. LAVOY; BRIAN A. MAYHEW; DAVID ALDRICH; STANLEY BISSELL; J.S. DITTY; ERNEST DRYER; DAVID DUQUEMIN; MARK HUNNIBEL; JEFF MARCHAND; STEVE ROACH; RANDY TROMMER

Defendants-Appellants

Appendix A

STEVEN CARLI, on behalf of himself and all others similarly situated; SHON PREJEAN, on behalf of himself and all others similarly situated

Plaintiffs-Appellees

versus

ALLIED PILOTS ASSOCIATION; RICHARD T. LAVOY; BRIAN A. MAYHEW

Defendants-Appellants

CENTER FOR REHABILITATIVE MEDICINE

Plaintiff-Appellee

versus

ALLIED PILOTS ASSOCIATION

Defendant-Appellant

JIM CASHION, Individually and on behalf of the Plaintiff Class; JOELLEN CASHION, Individually and on behalf of the Plaintiff Class

Plaintiffs-Appellees

versus

ALLIED PILOTS ASSOCIATION; ET AL.

Defendants

ALLIED PILOTS ASSOCIATION; RICHARD T. LAVOY; BRIAN A. MAYHEW; L.G. FOSTER; ROBERT AMES; NORMAN A. PATTERSON, JR.; DENNIS M. BRESLIN

Defendants-Appellants

Appendix A

MARK LEWIS, on behalf of himself and all others similarly situated

Plaintiff-Appellee

versus

ALLIED PILOTS ASSOCIATION; RICHARD T. LAVOY; BRIAN A. MAYHEW

Defendants-Appellants

NANCY GEIDEL; ET AL.

Plaintiffs

NANCY GEIDEL; RALPH A. MACDONALD; MARY C. CASCINO; DAVE ROGERS; CAROLYN ROGERS

Plaintiffs-Appellees

versus

ALLIED PILOTS ASSOCIATION

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Appendix A

A union of airline pilots violated the order of a federal court by continuing its work slowdown. The union has since paid substantial fines for violating the order and now faces suits seeking money damages under state law for the stoppage damages caused by the slowdown activity that violated the court order. These claimants attempt to run their state claims around *Garmon* preemption under an argument that state law would not here interfere with the federal labor machinery and its distinct remedial schemes for labor peace because the conflict complained of violates a federal court order. At the same time the state law claimants argue that they are not seeking to supplement the federal order by their suits. The district court accepted these arguments. We do not and reverse. We are persuaded that the claims are preempted under the *Garmon* doctrine and do not reach the question of preemption under the Airline Deregulation Act.

I

The Allied Pilots Association is the exclusive bargaining agent for the pilots of American Airlines, Inc. From February 6 through February 9, 1999 the APA staged a "sick-out" — an organized false reporting of illness to effect a work stoppage. On February 10, American sought and received a temporary restraining order from the United States District Court for the Northern District of Texas against the APA. The TRO, among other things, required the APA to make "all reasonable efforts" to end the sick-out. The APA manifestly did not do so, and on February 12, the trial judge heard American's motion to hold the APA in contempt. Ultimately, the district court awarded American $45 million

in compensatory damages,[1] a ruling which was upheld by this Court.[2]

This is a class action brought against the APA to recover economic damages claimed by over 300,000 displaced passengers as a result of the sick-out. The plaintiffs originally asserted both federal and state claims,[3] and the district court dismissed all claims with prejudice except a state claim of tortious interference with contract arising from post-TRO conduct of the APA.[4] Finding that this claim was not preempted by federal law, the district court dismissed the claim without prejudice to its being refiled in state court. The APA now appeals that decision.

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1. *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp.2d 909, 913 (N.D. Tex. 1999).

2. *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 586-87 (5th Cir. 2000).

3. The plaintiffs originally asserted claims under (1) the Railway Labor Act; (2) the Racketeer Influenced and Corrupt Organizations Act; (3) state common law claims of civil conspiracy, negligence per se, and tortious interference with contract.

4. The district court dismissed all of the plaintiffs' claims that were predicated on pre-TRO conduct, including tortious interference with contract, which was dismissed on *Garmon* preemption grounds. The plaintiffs do not appeal the dismissal of their pre-TRO-based claims and apparently concede that those claims are properly *Garmon* preempted. Therefore, our only task is to decide whether the entering of the TRO changes this result for their post-TRO tortious interference claims.

Appendix A

II

A

We review questions of federal preemption *de novo*, including *Garmon* preemption, which gets its name from the Supreme Court's ruling in *San Diego Building Trades Council v. Garmon.*[5] In *Garmon,* an employer sued a union in state court to recover damages from picketing that allegedly violated the National Labor Relations Act. The Court held that this state remedy was preempted by federal law because the state courts must yield to the exclusive jurisdiction of the NLRB — even when the NLRB has declined to take jurisdiction.[6] Preemption is necessary because "the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated policy of industrial relations. . . ."[7] Concerned with "conflict in its broadest sense" the Court eschewed a focus on the type of state regulation or claim, and adopted an approach that looks to the "nature of the activities which the States have sought to regulate."[8] *Garmon* has broad scope, and requires federal

5. 359 U.S. 236 (1959). *Garmon* preemption, first applied in the context of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, has been extended to the RLA. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

6. *Garmon*, 359 U.S. at 238.

7. *Id.* at 243.

8. *Id.*

preemption of state causes of action "if they attach liability to conduct that is arguably protected . . . or arguably prohibited" by federal labor relations law.[9]

Garmon itself recognized two exceptions to preemption. First, some conduct will "touch[ ] interests so deeply rooted in local feeling and responsibility that . . . [the Court] could not infer Congress had deprived the States of the power to act."[10] The classic example of this exception, provided by the Court in *Garmon* itself,[11] is that of union activities involving violence.[12] The second exception is for matters only of "peripheral concern" to federal labor relations law.[13] Neither of these exceptions apply here. The sick-out was non-violent and certainly, irrespective of the TRO issue, cannot be characterized as "peripheral" to labor relations law, since it is itself a work stoppage, one which a district court found to be prohibited by the RLA.[14]

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9. *Mobile Mechanical Contractors Ass'n, Inc. v. Carlough*, 664 F.2d 481, 487 (5th Cir. 1981).

10. *Garmon*, 359 U.S. at 244.

11. *Id.* at 247 ("It is true that we have allowed the States to grant compensation for the consequences . . . of conduct marked by violence and imminent threats to the public order.").

12. *See, e.g., Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139-40 (1957) (upholding state court injunction against violent picketing).

13. *Garmon*, 359 U.S. at 243.

14. The RLA requires that "minor disputes" including those over the meaning of a collective bargaining agreement provision on pay,

(Cont'd)

Appendix A

The Court has explicitly rejected a formalistic implementation of *Garmon*, and invited a balancing of state interests and federal regulatory interests in analyzing the preemption question.[15] The Court has thus refused to apply *Garmon* preemption where "it is safe to presume that judicial supervision [by the states] will not disserve the interests promoted by the federal labor statutes."[16]

At the same time, *Garmon* preemption is not confined to state claims made by parties to the labor relationship and third-party claims may also be preempted, because they similarly threaten the balance of labor- management relations.[17] In *Wisconsin Department of Industry, Labor &*

(Cont'd)
rules, or working conditions, be submitted to binding arbitration in the event that negotiations fail to produce a solution. 45 U.S.C. § 152. Federal district courts may (as here) enjoin strikes over minor disputes in enforcing the RLA. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 304 (1989).

15. *Farmer v. United Brotherhood of Carpenters and Joiners of Am.*, 430 U.S. 290, 297 (1977) (stating that a court must "determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.").

16. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971); *see also Windfield v. Groen Div. Dover Corp.*, 890 F.2d 764, 766 (5th Cir. 1989).

17. *United Mine Workers v. Gibbs*, 383 U.S. 715, 718-20 (1966) (preempting damages remedy under state law for injury resulting from peaceful portion of union protesting at mine that caused contractor

(Cont'd)

Human Relations v. Gould, Inc.,[18] the Court reaffirmed the *Garmon* preemption principle as "prevent[ing] states not only from setting forth *standards of conduct* inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act."[19] In *Gould* the Court struck down a Wisconsin statute that prevented the state from doing business with companies that had been judicially determined to have committed three separate violations of the NLRA within a five year period.[20] "That Wisconsin has chosen to use its spending power rather than its police power in enacting the debarment statute does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity."[21] *Garmon* preemption must extend to all types of state regulation that conflicts with federal labor relations law, whether that is by state statute, or state judicial supervision, whether in litigation between parties to the labor relationship or between downstream injured persons and parties to the labor relationship.

(Cont'd)
to lose employment and haulage contract); *Jacksonville Terminal*, 394 U.S. at 381-82 (holding that state court could not issue injunction against peaceful strike sought by third-party railroad terminal operator to avoid economic damages from shutdown of terminal).

18. 475 U.S. 282 (1986).

19. *Id.* at 286 (emphasis added).

20. *Id.* at 283.

21. *Id.* at 289.

We have previously stated that *Garmon* preemption is required when a state cause of action poses "a serious risk of conflict with national labor policy."[22] The Court has directed that we look not to the effect on labor-management relations of allowing a particular claim to proceed, but rather to conflict in the "broadest sense."[23] *Gould* reminds us that adding state remedies or penalties to the mix would be a "conflict" necessitating preemption.[24]

The plaintiffs take a narrow view of what constitutes such a conflict and argue that the federal and state legal regimes cannot be in conflict in this case, since a violation of the TRO is, of course, a violation of federal law. If the two regimes are not contradictory, they reason, there can be no preemption. This argument cannot stand in light of *Gould*. In *Gould* the plaintiff was being punished by the state remedial scheme for its *violations* of federal labor law. There was no contradiction between the two regimes, only a supplementation of the federal remedial scheme by the state.

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22. *Carlough*, 664 F.2d at 487.

23. *Garmon*, 359 U.S. at 242 ("The nature of the judicial process precludes an ad hoc inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of the federal-state conflict.").

24. *Gould*, 475 U.S. at 286 (quoting *Garmon*, 359 U.S. at 247 ("[T]o allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict. . . .")).

Therefore, the plaintiffs' niggardly view of "conflict" itself conflicts with the Supreme Court's decision in *Gould*, and must be rejected.

Garmon preemption does not depend on the merits of an adjudication of the conduct's legality under federal labor law — both prohibited and protected conduct are shielded from liability under state law. Plaintiffs argue, however, and the district court agreed, that the TRO put the APA on notice that its conduct was illegal, and therefore *Garmon* preemption is not needed to vindicate the goals of federal labor law. We must disagree — if conduct is *clearly* protected or prohibited by federal labor law, to our eyes the case for preemption is stronger.[25] Consequentially, the issuance of the TRO, indicating that the sick-out was likely to be found illegal under the RLA, only enhances the case for preemption of the state claim here. The concern of *Garmon* is not so much with the righting of labor wrongs, the concern of the labor relations laws themselves, as with the uniformity and singularity of remedy provided by federal law. It is a national labor policy — as this case makes vivid.

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25. *Gould*, 475 U.S. at 283-84 (finding that *Garmon* required preemption of statutory regime that punished firms that "found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5 year period."); *see also Sears, Roebuck, and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187 (1978) (distinguishing those activities that are "arguably" protected or prohibited from those, even more deserving of preemption, where "it is clear or may fairly be assumed that the subject matter which the state court sought to regulate . . . is either prohibited or protected by the Federal Act." (internal quotation omitted)).

The district court also found that attaching liability to post-TRO conduct that violates state law will not meaningfully disrupt labor-management relations — that is, that it will not seriously harm the federal regulatory scheme for labor relations. *Garmon* preemption requires the balancing of state interests with federal regulatory interests.[26] However, irrespective of the state interest in protecting private parties from interference with their freedom of contract,[27] the activities here are so fundamental that *Garmon* preemption must immunize them from state tort liability if the RLA structure is to be preserved. While courts have refused to apply *Garmon* preemption to state tort claims that served substantial state interests and did not threaten interference with the federal regulatory scheme,[28] this is not

26. *See Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1470 (5th Cir. 1993) ("That inquiry requires not only looking to the factual bases of each controversy, but also examining the interests protected by each claim and the relief requested.").

27. *Cf. Local 926, Int'l Union of Operating Engineers AFL-CIO v. Jones*, 460 U.S. 669, 689 (1983) (Rehnquist, J., dissenting) ("There can be no doubt that safeguarding the integrity of contractual relations is an interest of paramount importance in an economy such as ours.").

28. *See, e.g., Farmer*, 430 U.S. at 304-05 (refusing to preempt state claim of intentional infliction of emotional distress arising out of discrimination in hiring hall practices because proof of state claim required proof of "outrageous conduct" and the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens"); *Belknap v. Hale*, 463 U.S. 491, 510-12 (1983) (holding breach of contract

(Cont'd)

our case. Slicing the claim into before and after the TRO does not change the reality that the state law is being asked to take hold of the same controversy as the federal labor laws.

Finally, we are not persuaded by the plaintiffs' effort to distinguish the pre-TRO conduct of the APA from its post-TRO conduct.[29] "It is the conduct being regulated, *not the formal description of governing legal standards,* that is the proper focus of concern."[30] The existence of a TRO does not transform conduct constituting a work-stoppage, and therefore central to federal labor relations law, into conduct falling outside of the ambit of *Garmon.* We note also that any effort to characterize this suit as arising out of a violation of the TRO encounters an additional blockade — the

(Cont'd)
and misrepresentation claims by replacement workers against employer not preempted even though conduct was arguably prohibited by NLRA because the Board would focus on strikers' rights, not replacement workers' rights); *Windfield*, 890 F.2d at 769- 70 (refusing to preempt state claims arising out of employer's personal guarantee to former employee because they required only a "discrete, narrow inquiry into the relationship between [the employee] and his former employer.").

29. The plaintiffs argued in the district court that their claims based upon pre-TRO conduct were not *Garmon* preempted, but the district court held that those claims were preempted, and the plaintiffs do not appeal that determination.

30. *Lockridge*, 403 U.S. at 292 (emphasis added) (applying *Garmon* preemption to a state law claim for breach of contract arising out of a union's discrimination against the plaintiff).

plaintiffs are not entitled to any remedy for violation of a TRO to which they are not a party.[31]

III

The APA also argues that the plaintiffs' claims are preempted by the Airline Deregulation Act. Since we have concluded that those claims are *Garmon* preempted, we need not reach the question of ADA preemption.

IV

Because the plaintiffs' state law claims of tortious interference with contract are *Garmon* preempted, we REMAND this case to the district court and instruct that the claims be DISMISSED with prejudice.

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31. *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1356-57 (5th Cir. 1979) (holding that compensatory damages for nonparties could not be granted as part of Government's remedy in civil contempt proceeding against real estate corporation).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED, FILED AND ENTERED SEPTEMBER 26, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO.
3:99-CV-0480-P

IN RE ALLIED PILOTS CLASS ACTION LITIGATION

MEMORANDUM OPINION AND ORDER

Now before the Court for consideration are:

(1) The Findings and Recommendation of the United States Magistrate Judge filed November 15, 1999;

(2) Plaintiff's Response to Magistrate's Ruling Regarding Defendants' Motion to Dismiss filed December 6, 1999;

(3) APA Defendants' Opposition to Plaintiffs' Objections filed December 16, 1999;

(4) APA Defendants' Objections to the Findings and Recommendation of the United States Magistrate Judge filed December 6, 1999;

(5) Plaintiffs' Response to Allied Pilots Association Defendants' Objections to Magistrate's Recommendation filed January 7, 2000;

(6) APA Defendants' Reply in Further Support of their Objections filed January 25, 2000;

(7) Motion of the Texas AFL-CIO State Council for Leave to File Amicus Brief in Support of Objections of Allied Pilots Association to Magistrate Judge's Findings and Recommendation filed December 6, 1999, and

(8) Motion of Air Line Pilots Association, International for Leave to File Amicus Brief in Support of Objections of Allied Pilots Association to Magistrate Judge's Findings and Recommendation filed December 6, 1999.

After reviewing all of the above materials along with the relevant law, the Court hereby GRANTS the Motions for Leave to File Amicus Briefs,[1] SUSTAINS the APA Defendants' objection to the Recommendation of the Magistrate as to preemption of the civil conspiracy claim by the RLA, OVERRULES Defendants' remaining objections, OVERRULES the Plaintiffs' Objections to the Recommendation of the Magistrate, and MODIFIES the Recommendation of the Magistrate Judge as specified herein.

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1. Pursuant to L.R. 7.2(b), both the AFL-CIO and the Air Line Pilots Association, International demonstrated sufficient interest in the outcome of the litigation to warrant leave to file the amicus briefs.

Appendix B

FACTS

The facts giving rise to this case have been thoroughly discussed in the parties' motions, the Magistrate's Recommendation, and in *American Airlines, Inc. v. Allied Air Pilots Assoc.*, 53 F.Supp.2d 909 (N.D.Tex.1999). Therefore, the Court will give only a brief recitation of the facts.

Allied Pilots Association ("the APA" or "the Defendants") is the exclusive bargaining agent for more than 9,000 pilots of American Airlines, Inc. ("American"). (*See* Pls' Am. Compl. ¶¶ 2.07, 4.02). In 1998, a dispute arose over terms of the current collective bargaining agreement ("the CBA") between the APA and American.[2] *See American Airlines*, 53 F.Supp.2d at 914. The dispute culminated in a staged sick-out by the pilot members of the APA. *Id.* at 915. The sick-out began on February 6, 1999, and continued until February 9, 1999, resulting in the cancellation of more than 1600 American flights due to lack of crew. *Id.* On February 10, 1999, American applied for and received a temporary restraining order, ("the TRO"), from Judge Kendall of the Northern District of Texas. The TRO prohibited the union or

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2. Parties stipulated and agreed, and the court found, that the dispute leading up to the sick-out and the TRO was a "minor dispute" under the RLA. *See* Stipulanon filed by the parties on April 28, 1999, *cited with authority, American Airlines*, 53 F.Supp.2d at 938 n. 177; Findings of Fact and Conclusions of Law filed February 13, 1999, at 1, *cited with authority, American Airlines*, 53 F.Supp.2d at 938 n. 178. As discussed *infra*, because this was a minor dispute, the RLA prohibited the APA from engaging in a job action or self-help. *See Consolidated Rail Corp.* ("Conrail") *v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 303-04 (1989) (stating that the RLA permits the resort to self-help only when a "major dispute" is at issue).

its officers from "calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C. §§ 151-188 (1988)." *See American Airlines*, 53 F.Supp.2d at 918 (quoting language from the TRO).

The day after Judge Kendall ordered an end to the APA's staged sick-out, the number of canceled flights actually increased, so that on February 11, 1999, American canceled approximately 1200 flights.[3] *See American Airlines*, 53 F.Supp.2d at 915. On February 12, 1999, Judge Kendall held a hearing on American's motion to hold the APA in contempt for violating the terms of the TRO. At the conclusion of the hearing. Judge Kendall adjudged the Defendants to be in civil contempt of court and ordered the APA to place $10,000,000 into the Registry of the Court pending resolution of the amount necessary to reimburse American the amount of money lost because of the APA's contumacious acts. *See American Airlines*, 53 F.Supp.2d at 916. After reviewing additional evidence, the court issued its findings of facts and conclusions of law, which resulted in a civil contempt finding of more than $45,000,000 damages due to American by the APA. *See American Airlines*, 53 F.Supp.2d at 937.

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3. The Plaintiffs allege that American canceled over 2,200 scheduled flights between February 10, 1999 and February 17, 1999 "as a direct, intended, and foreseeable result of the Defendants' acts in furtherance of the Sick-Out." (Pls' Am. Compl. ¶ 4.21).

Appendix B

The case currently before this Court is a class action to recover economic damages suffered by passengers as a result of the APA's illegal sick-out. Plaintiffs represent ticketed passengers whose flights were either delayed or canceled as a result of the sick-out. They assert claims under: (1) the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1986); (2) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1984); and (3) state common law theories of civil conspiracy, negligence per se, and tortious interference with contract. Defendants filed a motion to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The matter was referred to United States Magistrate Judge Kaplan for Findings and Recommendation, which was issued on November 15, 1999. Magistrate Judge Kaplan recommended a dismissal of Plaintiffs' federal claims finding that the RLA does not permit a private cause of action for monetary damages and that Plaintiffs failed to satisfy the elements of a RICO claim. (*See Findings and Recommendation* at 8, 10). He also recommended dismissing Plaintiffs' claim for negligence per se after finding that claim requires an interpretation of the CBA and is therefore preempted by the RLA. (*See Findings and Recommendation* at 12-13).

In addressing the remaining state law claims of tortious interference with contract and civil conspiracy, Magistrate Kaplan divided the Plaintiffs into two sub-classes: those whose claims rested on acts occurring prior to the issuance of the TRO and those whose claims rested on acts occurring after the issuance of the back to work order. After analyzing the preemption arguments, he then found that the former group's claims should be preempted by the RLA while the

latter group's claims should not be preempted. (*See Findings and Recommendation* at 11-12). Finally, Magistrate Kaplan recommended that this Court decline supplemental jurisdiction over the surviving state law claims and dismiss them without prejudice so that Plaintiffs could institute their claims in state court. *Id.* at 18. Both parties filed objections to the Findings and Recommendations.

STANDARD

Pursuant to 28 U.S.C. § 636(b), this Court will make a de novo determination of those specified proposed findings and recommendations to which the parties make an objection. However, the Court need not consider frivolous, conclusory or general objections. *See DFW Vending, Inc. v. Jefferson County, Tex.*, 991 F.Supp. 578, 583 (E.D.Tex.1998) (stating that a blanket objection fails the specificity requirement of Fed.R.Civ.P. 72(b) and 28 U.S.C. § 636).

I. Defendants' Objections

Defendants advance four separate arguments in objecting to the Magistrate's finding that some of Plaintiffs' state law claims should not be dismissed with prejudice: (1) that federal labor law preempts and precludes state law remedies for damages resulting from a peaceful labor dispute; (2) that federal labor law preempts all of Plaintiffs' state law claims because their resolution depends upon an interpretation of the CBA; (3) that federal law precludes actions by non-parties for breach of a federal court order; and (4) that the Airline Deregulation Act of 1978 ("ADA"), Pub.L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of

49 U.S.C.), preempts all of the state law claims.[4] After reviewing Defendants' Objections, the amicus curiae briefs, and Plaintiffs' Response, the Court must agree with Defendants except as to the tortious interference with contract claim arising after the TRO was issued.

A. The RLA and the Nature of the Sick-Out

Congress enacted the Railway Labor Act of 1926 in order "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). In furtherance of that goal, the RLA provides a mechanism of mandatory arbitration for the "prompt and orderly settlement" of disputes. 45 U.S.C. § 151a. "Major" disputes concern "rates of pay, rules or working conditions," *id.*, and relate to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp. (Conrail) v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 302 (1989). "Minor" disputes "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a, and thus involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 33 (1957). "The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]." *Conrail*, 491 U.S. at 305.

4. The APA specifically cites 49 U.S.C. § 41713(b)(1) to support the preemption theory, which reads as follows: "[A] State . . . may not enact or enforce a law, regulation, or provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

The courts recognized parties could face risks when categorizing disputes as major and minor. Therefore, the Supreme Court established a rule that disputes shall be classified as "minor" if a party's actions can be "arguably justified" by the terms of an existing CBA. *Conrail*, 491 U.S. at 306.

During the initial proceedings before Judge Kendall, American and the APA stipulated that the dispute between the parties was a minor dispute under the terms of the RLA. *See American Airlines*, 53 F.Supp.2d at 917. Moreover, in issuing the TRO, Judge Kendall ruled that the dispute was a minor dispute. *See id.* at 917 n. 178. This determination was very important when considering the issuance of the TRO because under the RLA, unions retain no right to strike over a minor dispute. *See Conrail*, 491 U.S. at 305. Because the RLA prohibited the APA from striking over this minor dispute, Judge Kendall found that the sick-out was an illegal job action. *See American Airlines*, 53 F.Supp.2d at 917.

B. Lingle/Norris Preemption

The RLA preempts any state law claim where the resolution of that claim depends upon the interpretation of the CBA. *See Hawaiian Airlines v. Norris*, 512 U.S. 246, 262 (1994) (extending preemption of the LMRA as discussed in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) to the RLA). All disputes, however, do not result in preemption under the RLA. "Purely factual questions" about the conduct of an employer or employee do not require the court to interpret a CBA and are therefore not preempted by the RLA. *See Hawaiian Airlines*, 512 U.S. at 261. Under this analysis, substantive protections provided by the state, independent of the existence of a collective

bargaining agreement, are not preempted by the RLA. *See Hirras v. National Railroad Passenger Corp.*, 44 F.3d 278, 282 (5th Cir. 1995). The Supreme Court provided three examples of these types of claims that the RLA does not preempt: (1) a state law prohibiting the termination of an employee for reasons against public policy, such as whistleblowing; (2) a state law requiring cabooses on all trains; and (3) a state law requiring a certain number of employees to handle a certain type of railroad equipment. *See Hawaiian Airlines*, 512 U.S. at 256-57. The Supreme Court similarly provided an example of a state claim which was preempted by the RLA. In that case, the employee sued the employer for wrongful discharge, but the only basis for claiming that he should not have been discharged was his allegation that the action violated the terms of the CBA. *Id.* at 257. Therefore, his claim did not exist independently of the CBA and was preempted by the RLA. *Id.* Even if the resolution of the CBA dispute and the state claim requires the consideration of the same set of facts, the state law claim will not be preempted so long as the claim is derived from a source independent of the collective bargaining agreement. *Hirras*, 44 F.3d at 282.

The APA contends that the RLA preempts Plaintiffs' state law claims for tortious interference with contract and civil conspiracy because the resolution of those claims requires an interpretation of the CBA. The Court addresses each claim in turn.

1. Tortious Interference with Contract

In order to make a claim for tortious interference, a plaintiff must prove: (1) the existence of a contract subject to interference; (2) willful and intentional interference with that

contract; (3) the intentional interference was a proximate cause of plaintiff's damages; and (4) actual damage or loss occurred. *See Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991). As Magistrate Kaplan correctly stated, none of the elements of tortious interference requires the Court to interpret the CBA to resolve the claim. (See Findings and Recommendation at 11). Ascertaining each element demands only a purely factual inquiry. Specifically, the element of "willful and intentional interference" can be established without reference to the CBA.

Plaintiffs need not prove that the interference was illegal or unjustified in order to establish the elements of their claim. Yet conversely, Defendants assert that because they argue that their job action was justified and legal, preemption must result, even if the conflict is later judged to be a "minor dispute." Defendants contend that their proffered affirmative defense of justification demands an interpretation of the CBA to determine if the conflict was a "major dispute" that would justify Defendant's job action.[5] This Court will assume *arguendo* that if such interpretation of the CBA were necessary, then Plaintiffs' claim would be preempted.

Under Texas law, justification is a defense to a claim for tortious interference with contract. *See Victoria Bank*, 811

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5. In the Findings and Recommendation, Magistrate Kaplan did not consider whether the Court would need to reference the CBA in resolving the APA's justification defense. (*See Findings and Recommendation* at 11). However, this Court will assume without deciding that "[t]he claim is also preempted if [the defendant] seeks to defend its conduct on the ground that the conduct was justified by the CBA." *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1470 (9th Cir. 1991).

S.W.2d at 939. Justification may be shown if Defendants acted so as to protect or further their own legal rights or to protect a colorable legal right that equals or exceeds the rights of Plaintiffs. *See Bennett v. Computer Assoc. Intern., Inc.*, 932 S.W.2d 197, 202 (Tex. App. — Amarillo 1996, writ denied) (citing *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996)). Defendants contend that "their actions were indeed justified because the dispute with American was arguably a 'major' dispute under the RLA involving American's unilateral abrogation or alteration of the existing collective bargaining agreement." (APA Defendants' Objections at 14).

Defendants' argument fails with respect to post-TRO conduct because the issuance of the TRO precluded any justification defense premised upon the CBA. It is irrelevant to inquire whether Judge Kendall correctly interpreted the CBA in finding the conflict to constitute a "minor dispute," whether the TRO was therefore rightly or wrongly issued, or whether or not the sick-out was justified under the CBA. As the Plaintiffs argued, "[a]fter Judge Kendall's Back-To-Work Order, a judicial decree that the APA had no legal right to engage in or solicit the sick out, nothing in the CBA could even arguably justify the Defendants' conduct in maintaining the sick-out." (Pls' Response to APA's Obj. at 14). Judge Kendall's findings need not be consulted by this Court; once Judge Kendall issued the TRO, his order trumped any possible justification defense based upon the rights conferred by the CBA. Ordinarily, parties should always obey the court's orders, regardless of whether they think the orders are correct. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975). The only appropriate remedy is to appeal the order, and absent

a stay, the order must be complied with during appeal. *Id.* The terms of the CBA, a contract between labor and management, offer no legal justification for violating a court order under any interpretation. Since Defendants thus had no possible legal justification under the CBA, there is no need to interpret it.[6] Therefore, because the elements of tortious interference with contract as well as the affirmative defense thus involve purely factual inquiries not requiring reference to the CBA, the claim is not preempted by the RLA. *See Hawaiian Airlines*, 512 U.S. at 261.

It is important to note that Plaintiffs' claim does not rely upon establishing a violation of the TRO. As the discussion of the civil conspiracy claim makes clear, *infra*, third parties to a TRO may not base claims upon the violation of the TRO. Here, Plaintiffs can establish all of the elements of tortious interference regardless of the existence of the TRO. The TRO merely negates a possible affirmative defense that Defendants might wish to raise to justify their conduct. As Plaintiffs state:

> as part of their common law action for tortious interference with contract, Plaintiffs merely premise their claims on Allied Pilots' conduct which just happens to have already been found contemptuous by Judge Kendall. Plaintiffs properly plead the undeniable fact that such conduct was specifically prohibited by Judge Kendall's Back-To-Work Order. Plaintiffs do not

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6. The same logic would nullify a justification defense for civil conspiracy based upon the CBA. The Court does not reach this issue because the civil conspiracy claim is dismissed on other grounds, *infra*.

> seek liability against the APA Defendants merely because Judge Kendall prohibited their conduct, but rather, Plaintiffs point to Allied Pilots' violation of the Back-To-Work Order as evidence, arguably conclusive, of the lack of justification for Allied Pilots' tortious conduct.

(Pls' Response to APA's Obj. at 14-15). Indeed, as for justification *based upon the CBA*, the existence of the TRO conclusively precludes such a defense.

2. Civil Conspiracy

A civil conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Unlike the tortious interference claim, Plaintiffs cannot establish the elements of their civil conspiracy claim without relying upon the TRO or the CBA. Plaintiffs claim therefore fails.

By violating a court order, even one that is later set aside as incorrect, a party risks being held in civil or criminal contempt. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975). Holding the offending party in either civil or criminal contempt is the remedy for the violation of a TRO. *Id.* The TRO may only be enforced by parties to the suit from which the order emanated. *See Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1356-57 (5th Cir. 1979). A non-party to the action may not receive civil contempt damages, nor may an individual institute an independent claim for civil contempt. *See D. Patrick, Inc. v. Ford Motor*

Co., 8 F.3d 455, 459 (7th Cir. 1993). Furthermore, a TRO is not a final judgment for the purposes of collateral estoppel or res judicata. *See Texas v. Wellington Resources Corp.*, 706 F.2d 533, 537 (5th Cir. 1983) ("Hearings on these nonpermanent injunctions do not serve the same purpose as a hearing on the merits; they only preserve the status quo awaiting resolution of the merits.")

The passengers who have brought suit could not have brought an action to enforce the back-to-work order. Nor can the passengers claim that the TRO conclusively proves that the APA's actions were illegal. Accordingly, Plaintiffs cannot rely upon the issuance of the TRO alone to demonstrate unlawfulness necessary to prove the civil conspiracy claim. Plaintiffs seem to recognize this limitation by arguing that their claims are not prefaced upon the violation of the TRO but that it merely demonstrates the wrongfulness of the APA's conduct. But Plaintiffs demonstrate no basis for claiming the illegality of the conduct other than the violation of the TRO, as any claim based upon the CBA would be preempted by the RLA.[7] Since Plaintiffs have failed to satisfy the elements of the civil conspiracy claim, the claim is dismissed.

C. Garmon/Terminal Preemption

With all of the same concerns in mind for a single, federal regulatory scheme for labor law, the Supreme Court

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7. Plaintiffs' status as total strangers to the labor/management relationship and the relevant CBA does not require any different outcome. In fact, the NLRA has previously been held to preempt the claims of parties who were similarly situated as third parties to the CBA. *See Rehmar v. Smith*, 555 F.2d 1362, 1366 (5th Cir. 1977).

developed another form of preemption referred to as *Garmon* preemption.[8] *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The *Garmon* Court indicated a concern "with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." *Garmon*, 359 U.S. at 242. The Supreme Court identified as the common theme of its cases its "regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. Due to its concern with conflict "in the broadest sense," the judicial system began to focus on the nature of the activities which the states sought to regulate rather than the method of regulation imposed by the states. *Id.* at 243. "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.* The Supreme Court went on to state that it does not matter "whether the States have acted through laws of general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control the conduct which is the subject of national regulation would create potential frustration of national purpose." *Id.* at 244. This does not remove all power from the states to regulate labor activities

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8. Although *Garmon* addressed claims preempted by the NLRA, the Court has regularly referred to the NLRA for assistance in construing the RLA. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

in some aspects. The Court clearly delineated two areas that would remain within the states' power of control: regulation of activity that is a merely peripheral concern of federal labor law and regulations where the activity touches an interest deeply rooted in local feeling and responsibility. *Id.* at 243-244.

While *Garmon* began as a case that focused on the primary jurisdiction of the National Labor Relations Board, *see Jacksonville Terminal*, 394 U.S. at 384 n. 19, it has come to stand for a more sweeping proposition. According to the Fifth Circuit, "[t]he fundamental precept of *Garmon* is that liability under a state cause of action is preempted whenever it poses a serious risk of conflict with national labor policy." *Mobile Mechanical Contractors Ass'n, Inc. v. Carlough*, 664 F.2d 481, 487 (5th Cir. 1981). In *Carlough*, the Fifth Circuit preempted the plaintiff's state law claims for damages resulting from an unlawful, but peaceful, strike. The Court reasoned, "[t]he basis of the association's state claims — and the activity from which its alleged damages flow — is not the union's demand . . . but the strike in support of that demand." *Carlough*, 664 F.2d at 487. In short, the focus has shifted from the labor board's arguable jurisdiction over the subject matter to a preference for a unified area of labor law that is relatively immune from external pressures exerted by the state.

In this same trend, the Supreme Court later ruled that states cannot make laws refusing to contract with employers who regularly violate labor laws because such a prohibition would "interfere with Congress' 'integrated scheme of regulation' by adding a remedy to those already prescribed by the NLRA." *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 287 (1986). According to the Supreme Court,

it does not "matter that a supplemental remedy is different in kind from those that may be ordered by the Board, for "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Id.* at 287 (internal quotes omitted). The Fifth Circuit similarly recognized this principle in *Carlough* in stating that "to permit the association to supplement the [NLRB's] remedy with additional state damages runs counter to the teachings of *Garmon.*" *Carlough*, 664 F.2d at 488 (finding that an award of damages can interfere with national policy just as preventative regulation can).

1. Pre-TRO Conduct

In the matter at hand, allowing plaintiffs' state law claims premised on pre-TRO conduct to proceed would directly and substantially interfere with federal regulation of the APA's strike. The relationship between management and labor exists in a delicate balance. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Garmon*, 359 U.S. at 247. Allowing the state law tort claims to proceed under these circumstances, regardless of the legality of the strike, would place an incredible advantage in the hands of management. This principle has been regularly noted in cases involving strikes by public employees. In one case, a New York Court of Appeals wrote, "[a private action for damages] would be a powerful deterrent to public employee strikes, but it would also, as the claims for damages in the Burnes Jackson complaint, impose a crushing burden on the unions and each of the employees participating in the strike." *Burns Jackson Miller Simms & Spitzer v. Linder*, 59 N.Y.2d 314, 329 (N.Y. Ct. App. 1983).

Appendix B

Other cases have also noted the power associated with awarding damages for illegal strikes by a union. One court expressed reluctance to allow employers and unions "to use the club of damages against each other." *CSX Transportation Inc. v. Marquar*, 980 F.2d 359, 379 (6th Cir. 1992). The potential advantage to management prompted the Fifth Circuit to explicitly refuse an employer's claim for damages against a union for losses incurred as the result of an illegal strike. *See Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 89 (5th Cir. 1992); *Louisville and Nashville R.R. Co. v. Brown*, 252 F.2d 149, 155 (5th Cir. 1958). The Fourth Circuit recently came to the same conclusion and refused an employer's claim for damages resulting from a union's illegal strike over a minor dispute. *See Norfolk Southern Railway v. Brotherhood of Locomotive Engineers*, 164 LRRM 2641 (4th Cir. 2000).

Regardless of whether the damages are sought by the employer or a third party, the imbalance to the bargaining process would be just as profound. As Magistrate Kaplan recognized, the award of damages for damages incurred in the "collective bargaining process would, in effect, give the employer a weapon with which to keep the unions and their agents "in line." The risk is no less when the party seeking damages is a stranger to the collective bargaining process, such as airline customers affected by an illegal work stoppage. Management would still be able to use the threat of large damage awards in potential class actions such as this one to keep the unions and their agents 'in line.' " (Findings and Recommendation at 7) (quoting *National Airlines, Inc. v. Airline Pilots Association International*, 431 F.Supp. 53, 54 (S.D.Fla.1976)).

All of the above cases dealt with claims brought under the RLA. However, that is not dispositive of the issue currently before the Court. Whether the threat of damages comes under the RLA or common law, the result would be the same. The best way to produce more unified results and allow the parties to focus their attention on resolving the labor dispute is to allow the federal courts and federal law sole jurisdiction to implement any remedy.

In looking to the nature of the union's actions, one must acknowledge that the sick-out was the APA's response to the dispute with American. Regardless of the legality of the strike, the union's actions and the ability to strike lie at the heart of labor law. In most cases, strikes by participants of major industrial companies will affect thousands and thousands of people who are not a party to the CBA. Due to the far-reaching consequences of any action taken by these players, such strikes as the APA's cannot be considered peripheral to the concerns of labor law. Moreover, there is no evidence that the strike used any threats or violence or concerned any other matter that is grounded in local control so as to avoid preemption.

2. Post-TRO Conduct

The Court is mindful that the same factors justifying preemption of pre-TRO conduct could arguably justify preemption of post-TRO conduct. Nevertheless, this Court finds that permitting liability to third parties for conduct occurring after issuance of a TRO will not meaningfully disrupt the balance between labor and management.

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As discussed above, a TRO must be obeyed until set aside. *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Thus, neither a union nor an employer may have any reasonable expectation or good-faith belief that its conduct in violation of the TRO is legal, let alone legally protected by federal labor policy. Those who violate a court order do so at their peril, and merit no federal license to continue engaging in conduct that violates the rights of third parties even after a judge has forbidden them to do so. Further, there is no ambiguity in a rule refusing to exempt post-TRO conduct from valid state laws not implicating a CBA. The clear bright line is crossed only when a party continues to act contrary to state law after a court has forbidden such conduct by issuing a restraining order or injunction. There can be no confusion that such conduct no longer enjoys special legal protection.

The Court notes that the APA did, in fact, pay for the consequences of violating the court order. As a result of the sick-out, Judge Kendall imposed a civil contempt fine of $45,000,000 against the APA. Yet this award does nothing to compensate third parties damaged by illegal conduct. Third parties are not foreclosed by federal labor policy from seeking compensation for damage they suffered when such claims will not disrupt that federal policy. Indeed, national labor policy is not disrupted by permitting post-TRO conduct to be subject to state law; there is no "potential frustration of national purpose." *Cf. Garmon*, 359 U.S. at 242. Parties do not forfeit any rights granted under a CBA or subject to federal management. They merely are not permitted to hide behind the shield of federal preemption doctrine for conduct in violation of state law. All conduct prior to a court order continues to be subject to federal preemption, as does all

post-TRO conduct that implicates a CBA. Employers gain no new weapon in their arsenal with which to bludgeon potential strikers; unions will not be more hesitant to strike, for they incur potential liability to third parties only for conduct that takes place after a court order is issued.

Note again that enforcing the issuance of a TRO as the bright line between special legal protection and ordinary subjection to valid laws does not permit claims to be based upon the TRO itself. The TRO is instead a boundary; it marks the point at which the interest of national labor policy no longer outweighs the peculiarly local concerns of the courts enforcing state laws. *Cf. Garmon*, 359 U.S. at 243-244.

D. ADA Preemption

Defendants argue that Plaintiffs' common law causes of action are preempted by the Airline Deregulation Act of 1978 ("ADA"), Pub.L. No. 95-504, 92 Stat. 1705 (codified as amended in various sections of Title 49). This Court adopts the finding and recommendation of the magistrate to find no ADA preemption of Plaintiffs' claims.

E. Liability for Peaceful Labor Strike

This Court adopts the finding and recommendation of Magistrate Judge Kaplan to reject any defense that no common law claims can arise from a peaceful labor strike as inapplicable to this case.

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F. Disposition of Remaining State Law Claim

This Court adopts the findings and recommendation of the magistrate to dismiss the surviving state law claim without prejudice. The interests of clarity, judicial economy, and the appropriateness of addressing state law claims in state courts all counsel against this Court attempting to disentangle surviving and dismissed claims, surviving and dismissed plaintiffs, and then remanding them to their separate originating state courts. This Court chooses not to exercise its supplemental jurisdiction in this case.

II. Plaintiffs' Objections

Plaintiffs made three objections to the Findings and Recommendation. The first two object to Magistrate Kaplan's recommendation to dismiss rather than remand Plaintiffs' surviving state law causes of action. Plaintiffs' objections are OVERRULED. The Court's ruling makes clear that the state law claim remaining after this Court's previous rulings is dismissed without prejudice.

Plaintiffs' third objection is titled a conditional objection and argues that in the event the Court sustains the Defendants' objections, Plaintiffs object to the portions of the Findings and Recommendation that dismiss Plaintiffs' claims under the RLA, RICO, and the claims against the individual Defendants. Plaintiffs give no specific reason for their objection and merely incorporate by reference the legal arguments set forth in their briefs and response to Defendants' Motion to Dismiss. This objection is precisely the type of blanket objection that the Court need not consider. *See DFW*

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Vending, Inc. v. Jefferson County, Tex., 991 F.Supp. 578, 583 (E.D. Tex.1998). Accordingly, the Court OVERRULES Plaintiffs' Objections to the Findings and Recommendation.

DATED: September 26, 2000

s/ Jorge A. Solis
Jorge A. Solis
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX C — STATUTES INVOLVED

29 U.S.C.A. § 157. Right of employees as to organization, collective bargaining, etc.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 158. Unfair labor practices

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer —
>
> **(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> **(2)** to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer

shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he

has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

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(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider,

among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

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(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

* * *

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45 U.S.C.A. § 151a. General purposes

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independance of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C.A. § 184. System, group, or regional boards of adjustment

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated

to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.